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DECISION

THE COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-216397.2 **DATE:** March 18, 1985

MATTER OF: Lamari Electric Company

DIGEST:

1. When agency arbitrarily rejects a small business concern's low bid as nonresponsive and consequently withdraws its nonresponsibility determination from consideration by the Small Business Administration, the firm is entitled to bid preparation costs if it otherwise would have had a substantial chance for award.

2. When question of responsibility of a protester claiming bid preparation costs due to agency's improper withdrawal of a request for a certificate of competency (COC) has been referred to the Small Business Administration (SBA) in connection with a more recent procurement on which the scope of work is similar, GAO will decline to consider the matter until SBA completes its review.

Lamari Electric Company claims $13,075 in bid preparation costs, based on our decision in Lamari Electric Co., B-216397, Dec. 24, 1984, 84-2 CPD ¶ 689. In that decision, we sustained Lamari's protest but did not recommend remedial action. For the reasons indicated below, we decline to consider the matter at this time.

Our December decision concerned invitation for bids No. 263-84-B(95)-0142, covering renovations in Building 4 at the National Institutes of Health (NIH). The Department of Health and Human Services (HHS) rejected the low bid of Lamari, an individually owned small business, as nonresponsive because the trade name used by it was different from the trade name that same individual had used as principal on the bond. We sustained the protest, finding that the bidder and the principal on the bid bond were the same legal entity.

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In the procurement in question, HHS had found that regardless of responsiveness, Lamari was not a responsible, prospective contractor, due to past unsatisfactory performance. HHS initially referred the matter to the Small Business Administration (SBA) under the certificate of competency (COC) procedures; it subsequently discovered the discrepancy between the bid and bid bond. The question of Lamari's responsibility had not been resolved by SBA before HHS rejected Lamari on grounds of the purportedly defective bid bond and withdrew the request for a COC.

In its report on the protest, HHS argued that it would in any event not have been required to follow the COC procedures because small business nonresponsibility determinations based upon past performance are exempt under certain provisions of the Federal Acquisition Regulation concerning construction contracts. We found HHS's interpretation of the regulations unreasonable and held that such determinations "clearly are subject to the COC procedures." However, as indicated above, we recommended no remedy because of the ongoing performance and the urgent need for completion of the work.

The standard for entitlement to bid preparation costs is whether the procuring agency's actions with respect to the claimant's bid were arbitrary and capricious, i.e., were not taken in good faith, were contrary to law or regulation, or had no reasonable basis, so that--but for these actions--the claimant would have had a substantial chance of receiving the award. Richard Hoffman Corp., B-212775.3, Apr. 9, 1984, 84-1 CPD ¶ 393.

We believe HHS's rejection of Lamari's bid as nonresponsive where it was apparent that the same individual was both the bidder and the principal on the bid bond, and where the bond clearly referenced and described the covered work, was unreasonable. See ATD-American Co., 63 Comp. Gen. 549 (1984), 84-2 CPD ¶ 229. As indicated above, we also found HHS's arguments as to why it had not referred the matter to SBA to be unreasonable. See Propper Manufacturing Co., Inc., B-208035, Mar. 22, 1983, 83-1 CPD 279; International Limousine Service, B-206708, July 26, 1982, 82-2 CPD ¶ 77.

Consequently, on both grounds HHS's action would justify the award of bid preparation costs if Lamari otherwise had a substantial chance of award under the IFB. HHS, however, asserts that Lamari was not a responsible contractor and therefore that Lamari had no such chance.

We have occasionally reviewed nonresponsibility determinations concerning small businesses in situations where the SBA declined to consider the matter because only entitlement to bid preparation costs was at issue, not the award of a contract based on issuance of a COC. See Environmental Growth Chambers, B-201333, Oct. 8, 1981, 81-2 CPD ¶ 286. Here, however, the SBA will have an actual opportunity to consider the question of Lamari's responsibility in connection with a more recent procurement for a similar building project at NIH. HHS advises us that it has again found Lamari, the low bidder, nonresponsible due to past unsatisfactory performance and that on March 7, 1985, it referred the matter to the SBA's Philadelphia Regional Office.

Under these circumstances, we believe that SBA is the appropriate agency to review the entire history of Lamari's performance on past contracts with HHS. The outcome of this review may indicate whether Lamari had a substantial chance for award in connection with the procurement for which Lamari is claiming bid preparation costs, since the scope of work on the two procurements is similar and the elapsed time between them is relatively short, i.e., about 3 months.

If the SBA issues a COC, it may indicate that Lamari was a responsible contractor in the first instance, or merely that the performance problems that led HHS to conclude that Lamari was not capable of performing the first contract have now been resolved. On the other hand, a denial of a COC may indicate that the first nonresponsibility determination was reasonable, so that Lamari would not have had a substantial chance for award.

In either event, we decline to consider the matter at this time. When SBA completes its review, Lamari may reinstate its claim and attempt to show the likelihood that it would have been entitled to award under the prior procurement.

The claim is dismissed.

Harry R. Van Cleve
General Counsel